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No. 88-437

In The

Supreme Court of the United States

October Term, 1988

TAYLOR LAWRENCE, d/b/a GRIZZLY
AND DALEY RANCH,

Petitioner,

v.

UNITED STATES OF AMERICA,
WYOMING WILDLIFE FEDERATION,
AND NATIONAL WILDLIFE FEDERATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL AND WYOMING WILDLIFE FEDERATIONS IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a fence, constructed on private checkerboard land, whose principal intent and effect are to encircle and block antelope access to intermingled private and 9,600 acres of federal land, violate the Unlawful Inclosures of Public Lands Act of 1885 ("UIA")?

2. May Congress abate such a fence where the private landowner retains the right to exclude antelope from his own land, where wildlife use of the entire checkerboard is customary and necessary, where no diminution of private property was shown, and where the landowner has not bothered to invoke a state statute, which would compensate him for any damage done his land by wildlife?

3. Is a violation of the UIA excused because the fence owner holds sixty-day federal grazing leases to the encircled federal sections, when the fence precludes use of forage specifically reserved for wildlife in those federal leases?

RULE 28.1 LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Respondent Wyoming Wildlife Federation is a Wyoming non-profit corporation. The Wyoming Wildlife Federation is affiliated with approximately sixteen Wyoming sportsmen and conservation clubs.

The National Wildlife Federation ("NWF") is a District of Columbia non-profit corporation. NWF has two "subsidiaries:" National Wildlife Federation Endowment, Inc., and Wildlife Publications, Inc., both based in Washington, D.C. NWF also holds a majority interest in DeSoto Greetings, Inc., a Maryland Corporation. The National Wildlife Federation Endowment, Inc. also owns an interest in Sq.181, Inc., a District of Columbia Corporation. NWF has fifty "affiliates," one in each state except Maryland and Washington, as well as the Virgin Islands and Puerto Rico. Each affiliate is an environmental/conservation organization, like the Wyoming Wildlife Federation.

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STATEMENT OF THE CASE

Petitioner Lawrence's portrayal of the facts (Petition at 3-10) significantly deviates from the lower courts' findings in five instances:

1. First, the rancher fails to disclose the effect of his antelope-proof fence on wildlife, saying only the Bureau of Land Management ("BLM") "alluded to possible effects on antelope," (Petition at 6); that it was "asserted the Red Rim area is critical for the antelope," (Petition at 7); and that "the property within the . . . fence has not been closed to antelope . . . at anytime [sic] during the calendar year when it is allegedly critical for antelope use." Petition at 8.

In reality – as found by the lower courts – Petitioner's fence has been and will continue to be catastrophic to antelope in South Central Wyoming. To begin with, the BLM warned Lawrence "that a fence of this kind on the antelope winter range could have disasterous [sic] effects on the antelope population. . . ." Joint Stipulations of the Parties, Exhibit B, 29 June 1979 Memo.

The Tenth Circuit found Lawrence's fence blockaded the antelope's critical winter range during the severe winter in late 1983, with terrible effects:

> The winter of 1983 was unusually severe (even for Wyoming) and the testimony to the district court indicated that antelope collected against the fence and starved in an unsuccessful attempt to reach the Red Rim.

United States ex rel. Bergen v. Lawrence, 848 F.2d 1502, 1504 (10th Cir. 1988). Finally, the district court established

both the critical importance of Red Rim to antelope,[1] and the risk should Lawrence's fence remain:

> At the Hearing on Preliminary Injunction the Court was thoroughly convinced by the undisputed testimony of Mr. Moody and Dr. Alldredge that not only is the enclosed portion of Red Rim critical winter range for the Baggs antelope herd, but that if the fence remains standing, the herd may very probably be decimated by winter starvation.

United States ex rel. Bergen v. Lawrence, 620 F. Supp. 1414, 1417 (D. Wyo. 1985).

2. Second, Lawrence represents his fence was erected in order to "plant[] crested wheat grass . . . [and] protect [it] until it was firmly rooted in the ground." Petition at 6. This allegation is at odds with the district court's finding:

> The fence was built ostensibly to protect defendant's crop of crested wheat grass; but, in eight years the defendant has never planted that crop. The Court believes that he does not intend to, either. The fence has an ulterior purpose, and since the parties assured the Court that the mineral rights of that area were not involved, the only reason left for it is the exclusion of antelope from their winter range, which will result in decimation of that herd.

Lawrence, 620 F. Supp. at 1420.

3. Third, Lawrence suggests his BLM grazing leases to the federal sections enclosed by his fence excuse his

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[1] "The Wyoming Game and Fish Department has declared that portions of Red Rim constitute critical winter habitat for pronghorn antelope. . . . The Baggs antelope herd which uses Red Rim for winter range is estimated to number 2,000 or more, and those 2,000 antelope have virtually no other alternative winter feeding gounds." *Lawrence*, 620 F. Supp. at 1415.

UIA violation. Petition at 15. But he fails to disclose that despite an explicit reservation of forage for wildlife (antelope) in his leases, his fence precluded use of that reserved forage. The Tenth Circuit reached this conclusion, although it felt it irrelevant to the UIA violation:

> As we have noted, some of the AUMs on the enclosed public land were reserved for wildlife. The fence effectively precluded the use of these reserved AUMs, thus, we are not prepared to accept Lawrence's assertion that the fence was not in violation of the Taylor Grazing Act or his lease terms. . . . In either event, this point is not central to our decision, and we have no reason to decide whether Lawrence was in compliance with his grazing lease and the Taylor Grazing Act regulations.

Lawrence, 848 F.2d at 1510 n.11. While Lawrence claims his federal leases "also allow Taylor Lawrence to inclose the lands . . . by range improvements . . . on adjoining privately held lands without permit" (Petition at 5), he neither now nor has he ever cited to that provision in his lease. Respondents can find no such permission in the leases.

4. Fourth, Lawrence claims "there are cattle guards and gates – as well as several miles of fence that *is not* antelope proof through which access can be made by the antelope." Petition at 16 (emphasis original). His representation is contrary to the findings of the Tenth Circuit and district court, which found those openings provide no succor to starving antelope trying to reach food in winter:

> The testimony of Mr. Moody and Dr. Alldredge convinces the Court that gates, even if left open, make little or no difference to the antelope, which are creatures of habit that encounter a fence and will trail

> along it, totally missing small opening [sic] such as gates. . . . The clear, admitted, and intended effect of this fence is to exclude antelope. The presence of gates in it is unimportant.

Lawrence, 848 F.2d at 1511 n.13, *citing Lawrence*, 620 F. Supp. at 1419.

5. Finally, Lawrence asserts "[n]one of these [enclosed] public lands can be reached without trespass on Taylor Lawrence's private fee lands." Petition at 5. To the extent antelope might cross Lawrence's land to reach federal sections, that is not a trespass because antelope use of the land long preceded Lawrence's,[2] and, in any event, antelope have an easement by necessity to cross those lands.[3]

REASONS WHY THE PETITION SHOULD BE DENIED

This case represents a terrible but unique chapter in western wildlife history, where a rancher claims the right to starve thousands of antelope with no apparent gain to

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[2] Antelope use of Red Rim is an old custom predating private ownership of these lands. The district court found that "[t]he antelope grazed on the Wyoming big sagebrush at Red Rim long before the Daley Ranch was ever built, and unless driven to extinction, will graze there long after it is gone." *Lawrence*, 620 F. Supp. at 1420.

[3] Testimony before the district court showed that if antelope are to survive severe winters, they have no alternative other than to use Red Rim. The district court's finding is set out in note 1, *supra*.

himself. Hopefully, it is an isolated case which will rarely recur, since few would attempt such wanton destruction.

More unique than the facts of this case is the remedy, the Unlawful Inclosures Act of 1885, 43 U.S.C. §§ 1061-66 (1982). In the last fifty years federal courts cited the UIA just four times. Only twice was there any analysis of the statute, and only in this case was it found relevant.

Nor is there any deviation from past teachings of this Court which should prompt review. The Tenth Circuit recognized and followed this Court's teaching in *Camfield v. United States*, 167 U.S. 518 (1897) (a virtually identical fence found to violate the UIA) and *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).

For these reasons, elaborated below, Respondents Wildlife Federations request the Petition for Certiorari be denied.

1. There is no conflict between the Ninth and Tenth Circuits in their application of the UIA. Both followed this Court's direction in *Camfield*.

Petitioner tries to paint a conflict between the Tenth Circuit's decision below and the Ninth Circuit's holding in *Golconda Cattle Co. v. United States*, 201 F. 281 (9th Cir. 1912), *rev'd on reh'g*, 214 F. 903 (9th Cir. 1914). Lawrence claims the Tenth Circuit "found the *intent* with which the fence was erected to be irrelevant, and the *effect* of the fence on the public to be the decisive point." Petition at 11 (emphasis original). He then asserts this conflicts with the Ninth Circuit, which, he says, subscribes to the view that the intent behind the fencing must be considered. Petition at 13.

To begin with, Lawrence mischaracterizes – and seeks to escape from – the Tenth Circuit holding. He does not mention the circuit court would have found his fence in violation of the UIA even if intent were a crucial factor. The Tenth Circuit wrote:

> We are not persuaded that intent is a controlling factor, or that it would matter here if it was. . . . In this case, the effect of the fence is to exclude antelope from the public lands. In addition, the district court found that the *intent* of the fence was to exclude antelope. *Bergen*, 620 F.Supp. at 1420. That finding is not clearly erroneous. Thus, whether Lawrence's intent in building the fence is relevant or not, the fence is unlawful under the UIA.

Lawrence, 848 F.2d at 1508 n.8 (emphasis original).

Aside from mischaracterizing the Tenth Circuit's finding about his own intent, Lawrence seeks to heighten the perceived conflict by forgetting that although the *Golconda* court considered intent, the decision was grounded on the effect of the fence, as was the Tenth Circuit's. As *Golconda* held:

> While those fences were very extensive . . . various openings were left in them at points most frequently used by cattle and other animals in their passage to and from the grazing lands of the United States. . . . Such openings . . . admitted of reasonable access by the public to the public domain, for which reason the fences in question cannot be properly held to unlawfully inclose the lands of the United States.

Golconda Cattle Co., 214 F. 903, 909 (9th Cir. 1914). The *Golconda* court found no violation of the UIA because there was no effect of enclosing federal land – quite different from the federal land blockade in this case.

Instead of the divergence Petitioner Lawrence seeks to depict, both circuits have followed this Court's guidance in *Camfield*. Indeed, the Tenth Circuit looked directly to *Camfield* for guidance on this question: "First, we note that *Camfield* was not concerned with the landowner's intent. *Camfield* focused on the effect of the fence, not the landowner's intent." *Lawrence*, 848 F.2d at 1508 n.8 (citation omitted).

This Court has already clarified that it is the effect of the fence which spawns violations of the UIA, regardless of the fencebuilder's motivation:

> If they have enclosed the public lands in violation of the statute it is no answer to say that they have enclosed them for irrigating as well as for pasturage purposes. The violation of the statute is none the less manifest from the fact that the defendants had an ulterior purpose, or a purpose other than that of pasturage.

Camfield at 528.

Lawrence's real argument – which prompts his attempt to obscure the intent issue – is that although he intended to exclude antelope from federal lands, and accomplished it with devastating effectiveness, he did not intend to exclude people from those lands. This, he believes, should excuse his violation of the statute. The failure of this excuse is discussed in § 3, *infra*, showing antelope access is protected by the UIA.

2. The order below – requiring Lawrence to remove or modify all twenty-eight miles of his illegal fence – is not contrary to this Court's teaching in *Camfield*. Rather, it is the same remedy ordered in *Camfield*, and is supported by the evidence.

Lawrence's second attempt to gain review is to insist the order below, which required he remove or modify all

twenty-eight miles of his fence, is contrary to this Court's instructions in *Camfield*. Petitioner claims "[t]here is no legal basis for requiring Mr. Lawrence to remove . . . *all 28 miles* of his fence. . . . The courts relied on *Camfield* . . . yet ignored its conclusion." Petition at 14 (emphasis original). To support this proposition, Lawrence extracts a sentence from *Camfield* out of context and with it attempts to restrict the Court's jurisdiction to only those portions of the fence which were erected immediately outside the federal sections. There are three flaws in his attempt.

First, Lawrence's assertion is vitiated by the actual relief granted by the *Camfield* district court and not disturbed by this Court. Rather than requiring removal of only certain portions of the fence, as Lawrence suggests, the *Camfield* decree provided:

> And that said defendants do so absolutely remove and abate said fences, and *every part and parcel therof* within thirty days after the date of this decree; . . . and each and every of them be and hereby are forever and absolutely enjoined . . . from keeping . . . or supporting said fences and barriers *or any part or parcel thereof*. . . ."

Transcript of the Record, No. 15,912, Camfield v. United States, filed May 23, 1895, at 15 (of the printed version), containing the Decree of the District Court (emphasis added).

Second, when this Court stated there could be no objection to fences erected "near the outside line of [privately owned] sections," *Camfield* at 525, it was not sanctioning fencing schemes such as Camfield's and Lawrence's. Rather, this Court inquired into the fence's effect – if the fencing scheme blocked or enclosed federal

lands, it violated the UIA, even if located on private lands.

Third, the district court's order is supported by § 2 of the UIA, giving it discretion to determine the amount of the fence to be removed: "In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way. . . ." Here the district court made a factual finding that the entire fence must be removed to allow antelope access, based upon expert testimony that infrequent openings in the fence are insufficient to afford antelope access to the enclosed federal lands. *Lawrence*, 620 F. Supp. at 1419-20. This finding was confirmed by the Tenth Circuit. *Lawrence*, 848 F.2d at 1511 n.13. Lawrence has introduced no evidence to show that this finding was clearly erroneous.

3. There was no error in the Tenth Circuit's conclusion that the UIA guarantees access to federal land for legitimate purposes, and antelope use of federal land is such a legitimate use.

Lawrence's third attempt to present a certworthy issue centers around his belief that the decisions below – holding the UIA protects antelope access to federal lands – are wrong. Lawrence claims Congress never intended "to create and protect the right of *antelope* to free passage and transit over or through the public lands. . . ." Petition at 16 (emphasis original). However, Petitioner's argument fails, as the Tenth Circuit recognized, on the most obvious of grounds – the statute's plain meaning.

A. The plain meaning of the UIA shows it guarantees access to federal land for legitimate purposes, regardless of the entity seeking access.

The Petition does little to challenge the Tenth Circuit's decision on the scope of the UIA. The circuit court noted three indicators of the statute's breadth. First, § 1063 provides:

> No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, . . . any person from peaceably entering upon or establishing a settlement or entry under the public lands laws of the United States, or *shall prevent or obstruct free passage or transit over or through the public lands.* (Emphasis added.)

Both the district and circuit courts held because the second clause, unlike the first, does not limit protection only to "persons," Congress intended to guarantee free access to federal land without reference to the entity seeking access. *Lawrence*, 620 F. Supp. at 1417; *Lawrence*, 848 F.2d at 1508.

Second, the Tenth Circuit held the language in § 1061, declaring "all inclosures of any public lands . . . to be unlawful," even more emphatically demonstrated a broad guarantee to access to federal lands for legitimate purposes, and not just a right for *people* to reach those lands. *Lawrence*, 848 F.2d 1508-09. "Because the language of the statute is clear," the Tenth Circuit held it did not have the option of delving into the UIA's legislative history.[4] *Lawrence*, 848 F.2d at 1509.

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[4] While the Tenth Circuit felt it had no option to consider the UIA's legislative history, it nonetheless found "Lawrence's

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Third, the courts below found "support to extend the UIA beyond people in the early interpretations of the statute." *Lawrence*, 848 F.2d at 1509 (footnote omitted). None of the cases Petitioner presents alters the view that the UIA was intended "to prevent the obstruction of free passage or transit for *any and all lawful purposes over public lands*." *Lawrence*, 848 F.2d at 1509, *citing Stoddard v. United States*, 214 F. 566, 568-69 (8th Cir. 1914) (emphasis added).

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references to the legislative history of the statute [to be] inconclusive. There is no indication that wildlife was *not* meant to be protected, merely an emphasis on the interests of homesteaders and livestock." *Lawrence*, 848 F.2d at 1509 n.9 (emphasis original).

A more detailed examination of the statute's facilitation of homesteaders would show Congress intended to protect wildlife under the UIA. The right of homesteaders to access federal land would have been nugatory without the presence of wildlife on the land. Homesteaders were vitally dependent on wildlife for their food ("For centuries [antelope] furnished meat, hides, and tableware for the plains Indians. Then the whites came, and for a few decades antelope steaks were the most common palatable meat on the bill-of-fare along the covered wagon routes from the Mississippi to California and Oregon." V. Cahalane, *Mammals of North America* 69 (1961)); clothing ("For the cold winter months, animal skins were carefully preserved by the settlers to be fashioned into heavy leather coats, hats and shoes. The tough hide of the buffalo was particularly useful. . . . Buffalo robes shut out the terrific cold of the western winters." J. Stratton, *Pioneer Women* 68 (1981)); and even fuel (Buffalo chips were burned during the winter to keep noninsulated cabins warm. *Id.* at 62).

Congress would not pass a law to guarantee settlers the right to homestead federal land, and then fail to protect the means to survive once they arrived.

B. Foraging on and passage over federal land by antelope are legitimate uses of that land.

Given prior determinations that the UIA guarantees access to public lands for "lawful purposes," and the Tenth Circuit's affirmation of that view, it only remained to decide whether antelope grazing on BLM land was such a lawful purpose. The Tenth Circuit found any doubt about the legitimacy of this use was laid to rest in the Federal Land Policy and Management Act ("FLPMA") where Congress directed " 'the public lands be managed in a manner . . . that will provide food and habitat for fish and wildlife and domestic animals.' 43 U.S.C. § 1701(a)(8)." *Lawrence*, 848 F.2d at 1509.

Buttressing this statutory imprimatur of the antelope's legitimate use of federal land are Petitioner's grazing leases. Although they specifically reserved federal forage for antelope, Lawrence's fence precluded their ever reaching it. *Lawrence*, 848 F.2d at 1510 n.11.[5]

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[5] Despite this abuse of his grazing leases to the encircled federal land, Petitioner nonetheless suggests they give him "good-faith claim of leasehold title" (Petition at 15), which excuses his UIA violation under § 1061's exception for "claim or color of title made or acquired in good faith." The Tenth Circuit held the "color of title" statutory defense covers only color of *fee* title. *Lawrence*, 848 F.2d at 1510. That Lawrence's leases do not confer color of *fee* title is affirmed by the statute authorizing the leases, the Taylor Grazing Act: "The issuance of a [grazing] permit . . . shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315b (1982).

Moreover, the Taylor Grazing Act prohibits restricting "ingress or egress over the public lands . . . for all proper and

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4. The Tenth Circuit's decision – that removal of the fence does not take Lawrence's lands without just compensation – is consistent with this Court's holdings.

Lawrence's final justification for a writ of certiorari is a claim that "the right of antelope to protection under [the] UIA to access to public lands, resulting in the crossing of the private lands of Taylor Lawrence," would result in a "drastic modification of property rights. . . ." Petition at 19. He insists the holdings below impliedly confer such a right for antelope passage. This, he writes, is contrary to the holding in *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), that "there is no implied easement of access across private lands to public lands." Petition at 23. Accordingly, he reasons, requiring removal or modification of his fence results in a "seizure of private property for the use of antelope . . . without an appropriate contract or acquisition by condemnation." Petition at 23.

Lawrence's allegation – that antelope now have the right to cross his lands – can only come from a sloppy reading of the decision. In reality, the Tenth Circuit explained that "the district court did not grant the antelope any easement across Lawrence's private lands, nor

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lawful purposes." 43 U.S.C. § 315e. It also bars interference with "hunting or fishing." 43 U.S.C. § 315. These provisions militate against using the Taylor Grazing Act to excuse Lawrence's fence.

do we." *Lawrence*, 848 F.2d at 1505. The court held Lawrence "retains the right to exclude antelope from his own lands if he can accomplish that exclusion without at the same time effecting an enclosure of the public lands." *Lawrence*, 848 F.2d at 1507.

Aside from this critical oversight, Lawrence's claim that there will be a seizure of his property without compensation turns the facts of this case on their head. It is the rancher's antelope-proof fence that excludes wildlife from federal lands, even though Congress has explicitly provided for that use in FLPMA,[6] in the Taylor Grazing Act,[7] and even in Lawrence's leases.[8] "All that Lawrence

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[6] There is no question that wildlife use of public lands is a lawful purpose – FLPMA declares "it is the policy of the United States that . . . the public lands be managed in a manner that will protect the quality of . . . ecological . . . values . . . [and] that will provide food and habitat for fish and wildlife and domestic animals. . . ." 43 U.S.C. § 1701(a)(8).

[7] 43 U.S.C. § 315e provides: "Nothing contained in this subchapter shall restrict . . . ingress or egress over the public lands in such districts for all proper and lawful purposes." 43 U.S.C. § 315 provides: "Nothing in this subchapter shall be construed as in any way . . . vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district." As the district court noted: "Surely, the free passage of hunters *and their quarry* is a lawful purpose for which the public may seek access to public lands." *Lawrence*, 620 F. Supp. at 1417 (emphasis added).

[8] The Tenth Circuit noted "some of the AUMs on the enclosed public land were reserved for wildlife. The fence effectively precluded the use of these reserved AUMs, thus we are not prepared to accept Lawrence's assertion that the fence was not in violation of the Taylor Grazing Act or his lease terms." *Lawrence*, 848 F.2d at 1510 n.11.

has lost is the right to exclude others, including wildlife, from the public domain – a right he never had." *Lawrence*, 848 F.2d at 1508.

Even if the use of Lawrence's land were partially limited to permit antelope passage to the federal domain, that would not "take" his property for four reasons.

A. There is no taking where Congress acts to protect its own property or abate a nuisance, as it has here.

The removal of Lawrence's fence is justified as an exercise of Congress' property power and/or of its police power to abate nuisances. In either case, the alleged secondary impacts on Petitioner's private lands are not a taking.

(i). *Property Clause power.* This Court has already held Congress may utilize the UIA as an exercise of its property power to protect federal land. Some impingement on adjacent private land is not a taking:

> The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public . . . to forbid all enclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage.

Camfield, 167 U.S. at 525.

The principle was recently confirmed in *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) ("regulations under the

Property Clause may have some effect on private lands not otherwise under federal control"). Where Congress acts to protect legitimate uses on federal land,[9] the accompanying impact on private land is not a taking.

(ii). *Police power.* The Tenth Circuit explained that removal of Lawrence's fence "did not impose a servitude for antelope, but rather, abated a nuisance proscribed by federal law." *Lawrence,* 848 F.2d at 1507. In addition to its property power, Congress' power to abate nuisances – by use of the UIA – is settled:

> Considering . . . the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual.

Camfield, 167 U.S. at 525. *See also Mugler v. Kansas,* 123 U.S. 623, 668-69 (1887) ("prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property"); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* ___ U.S. ___, 107 S.Ct. 1232, 1246 n.22 (1987) ("Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance."); *Keystone,* 107 S.Ct. at 1256 ("We have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using

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[9] *See supra* notes 6, 7, and 8.

his property to injure others without having to compensate the value of the forbidden use.") (Rehnquist, J., dissenting).

Any doubt that enclosures of federal land were considered nuisances by Congress is resolved in the UIA's legislative history,[10] and by this Court's holding in *Camfield*.

B. There is no taking because Lawrence's property value was not diminished – it was likely enhanced.

Despite Lawrence's protest that abatement of the fence imposes a servitude on his private sections, he was unable to show any diminution of his property value from antelope. The Tenth Circuit wrote:

> [W]e can find nothing of Lawrence's that has been "taken". . . . [E]vidence at the trial indicated that competition between antelope and cattle was minimal . . . [and there was] also evidence in the record

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[10] The Committee on Public Lands of the House of Representatives, which reported the UIA, wrote: "This bill declares these inclosures unlawful; allows the citizen to abate them as *public nuisances*, a right the common law of England gives, and which has been exercised time out of mind." H.R. REP. No. 1325, 48th Cong. 1st Sess. at 7 (1884) (emphasis added). Representative Payton, the UIA's sponsor, stated the following to be the "facts in regard to the evil which this bill is intended to reach":

> [T]he evil which is sought to be cured is that which prevents an American citizen from making a settlement upon the public lands . . .

CONG. REC., 48th Cong. 1st Sess. 4769 (June 3, 1884).

> suggesting that foraging by antelope may actually improve the range for cattle.

Lawrence, 848 F.2d at 1507.

Lawrence's failure to show diminution of his property value is fatal to his claim his land has been taken. *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) ("How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question.") (footnote omitted). *See also* Laitos & Westfall, *Government Interference with Private Interests in Public Resources*, 11 Harv. Envtl. L. Rev. 1, 66 (1987).[11]

C. There is no taking when compensation is available. Lawrence could apply for compensation under the state game damage law, but has not.

Even if antelope did substantially diminish the value of Lawrence's property, that would not mean his property was taken. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). In Wyoming, Lawrence could seek compensation for any verifiable damage caused by antelope. *See* Wyo. Stat. § 23-1-901 (1977). His failure even

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[11] Even had there been some loss of Lawrence's private forage to antelope, this Court has already refused to review a case holding that where wildlife use of private land does not destroy most of its value, there is no taking. *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 1616 (1987).

to file a damage claim under the statute means his assertion that antelope passage will take his property is at best premature, for "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson* at 195.

D. Antelope access across Lawrence's land is not a taking because their use is historic and necessary.

Lawrence's claim that the UIA imposes a servitude on his land presupposes a right to exclude antelope. This assumption fails in light of this Court's earlier holdings.

In *Leo Sheep*, 440 U.S. 668, 687 n.24, this Court recognized that traditional customary or necessary uses warrant a right-of-way across the private checkerboard, which might otherwise not exist:

> This distinguishes the instant case from *Buford v. Houtz*, 133 U.S. 320 (1890). The appellants there were a group of cattle ranchers seeking, inter alia, an injunction against sheep ranchers who moved their herds across odd-numbered lots held by the appellants in order to graze their sheep on even-numbered public lots. This Court denied the requested relief because it was contrary to a *century-old grazing custom*. The Court also was influenced by the sheep ranchers' lack of any alternative. . . . Here neither *custom* nor *necessity* supports the Government. (Emphasis added.)

Antelope use of Red Rim, unlike the new road in *Leo Sheep*, is an old custom predating private ownership of the land. The district court found that "[t]he antelope

grazed on the Wyoming big sagebrush at Red Rim long before the Daley Ranch was ever built, and unless driven to extinction, will graze there long after it is gone." *Lawrence*, 620 F. Supp. at 1420.[12]

Even if antelope did not have a customary and preexisting right to cross Lawrence's lands, they could claim a right-of-way by necessity. In *Leo Sheep* and *Buford* this Court was "influenced by the sheep ranchers' lack of any alternative. . . ." *Leo Sheep*, 440 U.S. at 687 n.24. In ruling the sheep ranchers had an implied license to drive their sheep across plaintiffs' property – the only route available to reach public grazing lands – this Court believed a rule preventing this would be "inconsistent with the habits, the interests, *necessities* and understanding of the people." *Buford v. Houtz*, 133 U.S. at 330 (emphasis added).

In this case there is no question that if antelope are to survive critical winters, they have no alternative other than to cross private lands to reach Red Rim.[13]

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[12] The district court's finding is ratified by the historic record – antelope used Red Rim well before the lands were transferred to private ownership in the Union Pacific Act of 1862: "Small herds of antelope" and "abundant signs of buffalo and antelope" were reported in 1850 fifteen miles south of Wamsutter [placing the sighted antelope within thirty-five miles of Red Rim]. In 1877, antelope were reported to be "very abundant" and "were very common in lakes around Lost Creek." (Lost Creek is approximately 60 miles from Red Rim.) R. Dorn, *The Wyoming Landscape, 1805-1878*, 27, 46, 48 (1986).

[13] The district court found the pronghorn had no alternative. *See supra* note 1.

CONCLUSION

For the above reasons, Respondents Wyoming and National Wildlife Federations respectfully ask that Lawrence's Petition for a Writ of Certiorari be denied.

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Respectfully submitted,

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